

FEDERAL CIRCUIT COURT OF AUSTRALIA

ALI v MINISTER FOR IMMIGRATION & ANOR

[2018] FCCA 3025

Catchwords:

MIGRATION – Partner visa application – review of decision of Administrative Appeals Tribunal – whether Tribunal erred in failing to “further investigate” – whether Tribunal erred in failing to consider claim – no jurisdictional error – application dismissed.

Legislation:

Migration Act 1958 (Cth)

Migration Regulations 1994 (Cth), cl.820 of sch.2, criterion 3001 of sch.3

Applicant: SHRIF ABDELMONEIM AHMED ALI

First Respondent: MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent: ADMINISTRATIVE APPEALS
TRIBUNAL

File Number: SYG 588 of 2017

Judgment of: Judge Smith

Hearing date: 28 May 2018

Date of Last Submission: 28 May 2018

Delivered at: Sydney

Delivered on: 16 November 2018

REPRESENTATION

The applicant appeared in person.

Solicitors for the Respondents: Ms K Garaty, HWL Ebsworth

ORDERS

(1) The application be dismissed.

(2)

(3)

(4)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 588 of 2017

SHRIF ABDELMONEIM AHMED ALI

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. This is an application for judicial review of a decision of the Administrative Appeals Tribunal made on 31 January 2017. The Tribunal affirmed a decision of a delegate of the Minister to refuse to grant the applicant a Partner (Temporary) (Class UK) (subclass 820) visa.

Background

2. The applicant is a citizen of Egypt who first arrived in Australia on 11 May 2007 holding a subclass 572 visa. He was subsequently granted a further two subclass 572 visas, with the second of these ceasing on 16 March 2014. The applicant then applied for a further subclass 572

visa and a protection visa on 25 February 2014 and 23 September 2014¹ respectively. Both applications were refused.

3. On 19 October 2014, the applicant applied for a partner visa on the basis of his relationship with his sponsor. The applicant and his sponsor met in mid-2012 and married in October 2014. His application was for both a class UK visa and a Partner (Residence) (Class BS) visa.
4. The criteria for both of these applications falls under cl.820 of sch.2 to the *Migration Regulations 1994* (Cth).
5. On 4 February 2016, a delegate of the Minister made the decision to refuse to grant the applicant a partner visa. The delegate found that the applicant's relationship could not be properly classified as "spousal" as required by sub-cl.820.211(2)(a) of the Regulations and that he did not satisfy the requirements under sch.3 as required under sub-cl.820.211(2)(d)(ii). There were no compelling reasons to warrant the waiver of the criterion. The applicant applied to the Administrative Appeals Tribunal for review of the delegate's decision.
6. On 25 November 2016, the Tribunal wrote to applicant inviting him to attend a hearing on 24 January 2017 and requested that he provide any additional relevant material concerning compelling circumstances to it by 17 January 2017. On 6 January 2017, the applicant's migration agent forwarded a letter to the Tribunal as well as providing a number of documents in support of the relationship between the applicant and his sponsor. By email dated 22 December 2016, the applicant's migration agent requested that the hearing be rescheduled due to his unavailability. The applicant and his sponsor appeared before the Tribunal on 30 January 2017 and on 31 January 2017 the Tribunal affirmed the decision under review.

Tribunal's decision

7. The Tribunal accepted the applicant's claims, at face value, that he was in a genuine and continuing relationship with the sponsor. However, the Tribunal's review was confined to whether the applicant met criterion 3001 of sch.3 to the Regulations at the time of making his application. As the applicant's visa application was not made within 28

¹ The date of the protection visa application, in the alternative, may have been 23 December 2014: see delegate's decision, page 110 of Exh.A to the application.

days of the relevant date, being 16 March 2014, the Tribunal was not satisfied the applicant met the sch.3 criteria. The Tribunal then turned its mind to consider whether there were compelling reasons for not applying that criteria.

8. The Tribunal considered the applicant's arguments concerning his role as an emotional and financial support for his sponsor and her child; however, it did not accept that these grounds constituted compelling reasons to waive the sch.3 criteria. For those reasons, the Tribunal was not satisfied that the applicant met the requirements of sub-cl.820.211(2)(d)(ii) and affirmed the delegate's decision.

Consideration

9. There are four grounds in the application.
10. The first ground is that the Tribunal failed to "further investigate" the psychological, mental, emotional and social development of the sponsor's son or to "discuss these issues" in its reasons for decision.
11. The Tribunal expressly referred to and considered the psychological, mental, emotional and social development of the sponsor's son: [25], [26], [27], [31]-[34] and [40]. The Tribunal made detailed enquiries of the applicant and his sponsor with respect to the sponsor's son and their day to day lives. There was no documentary evidence before the Tribunal that the sponsor's son had any special needs or requirements or had been "identified or diagnosed by a healthcare professional": [33]. It was open to the Tribunal on the evidence before it to form the conclusion that it did. While there is no general duty to exercise its power to obtain further information, it may be accepted that, like any discretionary power, there may be circumstances in which a failure to exercise that power may infect the Tribunal's decision with jurisdictional error; for instance, when there is a failure to adjourn a review to allow an applicant to obtain critical and readily available information.
12. Here, there is nothing to indicate that it was not within the scope of the Tribunal's decisional freedom to decide what powers it would or would not exercise to obtain further information concerning the sponsor's son. First, it is not clear just what information that might be. As a corollary

of that, it is not possible to say that any further information was available, let alone readily available. Secondly, the applicant had put forward material to support his claims and made submissions. It was a matter for the Tribunal then to assess whether the circumstances detailed in that information amounted to compelling reasons. In those circumstances, in the context of the Tribunal's statutory functions, the Tribunal's failure to "investigate further" was entirely justifiable. The first ground is rejected.

13. The second ground is that the Tribunal erred by not finding out whether the sponsor's son had regular contact with his father. The applicant also argues that the Tribunal did not clarify how it made the finding that the contact between the child and his father was regular.
14. As noted in this ground, the evidence before the Tribunal was that the sponsor's son saw his father once a month and occasionally more often. The Tribunal construed that as "regular" contact. It was open to the Tribunal to describe the visits as "regular": the length of the period between events does not affect the predictability of their recurrence. Further, given that the finding that there was regular contact was based on the evidence before it, there was no legal unreasonableness involved in that finding. The second ground is rejected.
15. The third ground is that the Tribunal failed to give consideration to the sponsor's history of domestic violence in her previous relationship and any adverse effect this may have on her and her son.
16. The sponsor gave oral evidence at the hearing about the domestic violence she had suffered in a previous relationship and the impact that this had had on her son. Indeed, her evidence was that her son had seen some horrible things, was angry for a long time but "is now much happier".
17. The applicant asserts in this ground that the Tribunal made reference to the domestic violence suffered by the sponsor at [34] of its reasons. That is not correct. The Tribunal accepted the applicant's and his sponsor's evidence that they sought the assistance of a psychologist for stress and anxiety "in relation to the processing of the parties' partner visa application". There was no evidence before the Tribunal that these visits, or any subsequent treatment, were related to the domestic

violence suffered by the sponsor. The Tribunal did in fact give consideration to the issue of domestic violence but did not find it a compelling reason to waive the criteria. This ground is rejected.

18. The applicant's fourth ground is concerned with the applicant's fear of returning to "[T]he dangerous situation in Egypt". The applicant asserts that the Tribunal did not ask for details of the applicant's fear and that it made an assumption about the applicant's family support over there.
19. The situation in Egypt was raised in submissions by the applicant's agent. These submissions were that "at the time of application, Egypt was and still experiencing acts of terrorism and that would create more mental health problems for her and her son if her husband went overseas to lodge his application offshore"². The Tribunal found that there was psychological help available to the sponsor to manage any personal issues arising from any temporary separation (at [34]) and, having noted that the applicant had travelled back to Egypt on a number of occasions since 2012, found that the applicant could access "family support from his mother and brother and would have somewhere to live": [36].
20. The Tribunal dealt with the claim concerning Egypt in the way it was put by the applicant and was required to do no more. Further, contrary to the applicant's submission, it based its finding about the availability of family support on the evidence before it, namely, the fact that that support had been available every other time the applicant had returned to Egypt since 2012. This ground is rejected.
21. The applicant was granted leave at the conclusion of the hearing on 28 May 2018 to file an affidavit attaching a transcript of the Tribunal hearing and written submissions in support of any ground he wished to raise in respect of such by 25 June 2018. The applicant filed an affidavit annexing the transcript on 12 July 2018. No written submissions were filed. In light of the failure to provide any submissions there is no asserted ground of review before the Court and I need not consider and have not considered the transcript.

²Exhibit.A, page 84.

Conclusion

22. For the above reasons, the applicant has not established that there is any jurisdictional error in the Tribunal's decision and the application must be dismissed.

I certify that the preceding twenty-two (22) paragraphs are a true copy of the reasons for judgment of Judge Smith

Date: 16 November 2018